

# *WRIGHT V YUKON: SAFER COMMUNITIES AND NEIGHBORHOODS LEGISLATION AND THE CHARTER*

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## **I. Introduction**

Celia Wright was given five days to move out of a home that she shared with her common-law spouse and eight children. The eviction applied to her mother-in-law, who suffered from mental health issues and lived in a suite on the same property. Ms. Wright received the notice two weeks before Christmas, during the middle of the winter in the northern town of Whitehorse. The territorial government and the landlord were evicting Ms. Wright under the *Safer Communities and Neighbourhoods (SCAN) Act*.<sup>1</sup> Ms. Wright challenged the constitutionality of the legislation and won. The Court found the provision that allowed for her eviction on short notice, without a court order, violated section 7 of the *Charter*, but not section 15.

This case comment synthesizes and analyzes the decision in *Wright v Yukon*. The case is of precedential value for other jurisdictions with SCAN legislation because it highlights the shortcomings of using SCAN to evict residents without sufficient procedural safeguards or adequate scrutiny of the evidence justifying the eviction. It argues that the section 7 analysis marks a promising evolution in using the *Charter* to vindicate housing rights because of the Court's explicit recognition of the harms that flow from forcible eviction. Conversely, the section 15 analysis underlines the difficulties of proving adverse effect discrimination, in this case race-based discrimination, especially following the Supreme Court of Canada's 2022 decision in *R v. Sharma*.<sup>2</sup> Finally, the case highlights the challenges facing litigants who advance constitutional claims against better-resourced governmental litigants on behalf of marginalized groups and raises questions about government lawyers' ethical and other obligations in such contexts.

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<sup>1</sup> *Safer Communities and Neighbourhoods Act*, SY 2006, c 7 [*Safer Communities and Neighbourhoods Act* (YK)].

<sup>2</sup> *R v Sharma*, 2022 SCC 39 [*Sharma*].

Part II of the case comment provides an overview of SCAN legislation: where it came from and how it works. Part III summarizes the factual background of *Wright v Yukon*, the procedural wrangling that predated the hearing on the merits, and the Court's reasoning on Ms. Wright's section 7 and 15 claims. Part IV analyzes the case and its implications for future litigation and law reform.

## II. The Origins and Structure of SCAN Legislation

SCAN legislation has been implemented by five provinces and one territory. The first act of its kind was introduced and passed in 1999 by the Manitoba provincial government in response to the perception of rising crime in that province.<sup>3</sup> Despite the fact that the crime rate was at its lowest in two decades, there was widespread concern across the country about crime, and particularly its violent manifestations.<sup>4</sup> Since criminal matters are generally the jurisdiction of the federal government,<sup>5</sup> provincial governments were looking for other ways to demonstrate they were tough on crime.<sup>6</sup> Manitoba's provincial Progressive Conservative (PC) government tried to combat the perceived problems with crime and 'urban decay' by introducing *The Community*

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<sup>3</sup> In 1999, SCAN legislation was introduced in Manitoba by the Progressive Conservative provincial government as Bill 42, *The Community Protection and Liquor Control Amendment Act*, 5th Sess, 36th Leg, Manitoba, 1999. It received Royal Assent on July 14, 1999, right before an election, which the provincial New Democratic Party won. The legislation was subsequently reformed into Bill 10, *The Safer Communities and Neighbourhoods and Consequential Amendments Act*, 2nd Sess, 37th Leg, Manitoba, 2001 (assented to 6 July 2001); now *The Safer Communities and Neighbourhoods Act*, CCSM c S5 [*The Safer Communities and Neighbourhoods Act* (MB)]. At this time in the late 1990s, Manitoba reported one of the highest violent crime rates in Canada, and Winnipeg reported the highest rate of robberies among the largest Canadian cities, see Statistics Canada, *Crime Statistics in Canada, 1999*, by Sylvaine Tremblay, Catalogue No 85-002-XIE, Vol 20, No 5 (Ottawa: Statistics Canada, 18 July 2000).

<sup>4</sup> Canadian Centre for Justice Statistics and Time Series Research and Analysis Centre, Statistics Canada, *Exploring Crime Patterns in Canada*, by Valerie Pottie Bunge, Holly Johnson & Thierno A Balde, Catalogue No 85-561-MIE2005005 (Ottawa: Statistics Canada, June 2005), fig 1. On the dropping crime rate see "Crime Takes a Dive in Winnipeg (First 11 Months of 1996)", *Canadian Press NewsWire* (21 January 1997); for an examination of the factors that led to the drop in crime rate see Marc Ouimet, "Explaining the American and Canadian Crime 'Drop' in the 1990's" (2002) 44:1 Can J Crim 33; for analysis of perceptions of crime in Canada see Jane B Spratt & Anthony N Doob, "Fear, Victimization, and Attitudes to Sentencing, the Courts and the Police" (1997) 38:3 Can J Crim 275. In Alberta, the same report that called for the implementation of SCAN legislation also acknowledged that the Canada's crime-rate was at a 25-year low, see Crime Reduction and Safe Communities Task Force, *Keeping Communities Safe: Report and Recommendations*, by Heather Forsyth (Edmonton: Crime Reduction and Safe Communities Task Force, 2007) at 14 (crime rate), 49 (SCAN legislation).

<sup>5</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5. While Parliament has plenary and exclusive power over criminal law granted by the Constitution, the courts have allowed the provinces to legislate in areas that can be considered quasi-criminal (i.e. traffic offences, regulation of cannabis, see *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10). The Saskatchewan Provincial Court held that SCAN legislation falls within provincial jurisdiction, see *R v Bitz*, 2009 SKPC 138 at para 42 [*Bitz*].

<sup>6</sup> Andrew Woolford & Jasmine Thomas, "Exception and Deputization under Today's NDP: NeoLiberalism, the Third Way, and Crime Control in Manitoba" (2011) 26:1 Can JL & Soc 113.

*Protection Act*.<sup>7</sup> It targeted undesirable behaviours and criminal activities that had an ‘adverse effect’ on the neighbourhood and provided a civil remedy to affected individuals. However, the PC government lost an election before the bill could be proclaimed. Once the New Democratic Party (NDP) took control of the government, it reworked the legislation into the SCAN Act to provide a civil means for the government to address problem properties, where criminal or other undesirable activities were occurring. It is notable that SCAN legislation was created by the PC party and passed by an NDP government; commentators have noted the desire of politicians to appear “tough on crime” transcends party lines.<sup>8</sup> It also portended how popular this type of legislation would become throughout the rest of Canada.

Following in Manitoba’s footsteps, Saskatchewan,<sup>9</sup> New Brunswick,<sup>10</sup> Nova Scotia,<sup>11</sup> Alberta<sup>12</sup> and Yukon<sup>13</sup> passed SCAN acts. The provincial governments in British Columbia<sup>14</sup> and Newfoundland and Labrador<sup>15</sup> have both passed SCAN legislation but not yet proclaimed it into force. The government of Ontario considered adopting SCAN legislation, but after encountering significant resistance to the idea, did not proceed.<sup>16</sup>

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<sup>7</sup> *The Community Protection and Liquor Control Amendment Act*, *supra* note 3.

<sup>8</sup> Woolford & Thomas, *supra* note 6; Julian V Roberts, Nicole Crutcher & Paul Verbrugge, “Public Attitudes to Sentencing in Canada: Exploring Recent Findings” (2007) 49:1 Can J Crime & Criminal Justice 76; noting similar all-party support when SCAN legislation was passed in Alberta see Jeff Doherty, “Taking back the Neighbourhood: When Sheriffs Shut Down Drug Houses”, *Alberta Views* (30 May 2019), online: <albertaviews.ca/taking-back-neighbourhood/> [perma.cc/J2KG-6BCC].

<sup>9</sup> *The Safer Communities and Neighbourhoods Act*, SS 2004, c S-0.1 [*The Safer Communities and Neighbourhoods Act* (SK)].

<sup>10</sup> *Safer Communities and Neighbourhoods Act*, SNB 2009, c S-0.5 [*Safer Communities and Neighbourhoods Act* (NB)].

<sup>11</sup> *Safer Communities and Neighbourhoods Act*, SNS 2006, c 6 [*Safer Communities and Neighbourhoods Act* (NS)].

<sup>12</sup> *Safer Communities and Neighbourhoods Act*, SA 2007, c S-0.5 [*Safer Communities and Neighbourhoods Act* (AB)].

<sup>13</sup> *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1.

<sup>14</sup> *Community Safety Act*, SBC 2013, c 16, as amended by *Community Safety Amendment Act, 2019*, SBC 2019, c 34. The BC Civil Liberties Association has used freedom of information legislation to force the government to disclose the projected cost of implementing the legislation, resulting in litigation over the scope of the government’s redactions: *British Columbia (Minister of Public Safety) v British Columbia (Information and Privacy Commissioner)*, 2024 BCSC 345.

<sup>15</sup> *Safer Communities and Neighbourhoods Act*, SNL 2007, c S-5.1 [*Safer Communities and Neighbourhoods Act* (NL)].

<sup>16</sup> See e.g. Bill 106, *Safer Communities and Neighbourhoods Act, 2010*, 2nd Sess, 39th Leg, 2008 (second reading 30 October 2008).

Each province and territory's legislation has the same general structure.<sup>17</sup> It creates a process for members of a community to report a particular *property* that is being *habitually used* for an unlawful or other undesirable activity and is *adversely affecting* the surrounding community. SCAN also provides for a Director, who has both investigative and enforcement powers, including the ability to evict residents from a property.

The investigation and enforcement process begins with a complaint – typically anonymous – by a member of the public who claims that their community or neighbourhood is being adversely affected because a property is habitually being used for a “specified use”.<sup>18</sup> Specified uses are defined in the legislation. Generally, they include contraventions of criminal laws like the *Controlled Drugs and Substances Act*,<sup>19</sup> and *The Liquor, Gaming and Cannabis Control Act*.<sup>20</sup> However, some activities which are not criminal can also be the subject of a complaint. For example, the Saskatchewan legislation defines specified use to include use of any “intoxicating substance”, including glue and nail polish remover.<sup>21</sup>

Because SCAN Directors rely on tips from the public, some provinces have guidance on their websites for the public on what to look for that may indicate unlawful activity. For example, the Saskatchewan SCAN webpage provides “Signs of illegal activity” that might be taking place at a home or business:

- Frequent visitors – often driving expensive vehicles – at all times of the day and night;
- Frequent late night activity;
- Blackened windows or curtains always drawn;
- Unfriendly people who appear to be secretive about their activities;
- People watching cars suspiciously as they drive by;
- Heavy home security installations;
- Strange odours coming from the building or garbage;

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<sup>17</sup> This case comment does not discuss the sections found in some SCAN legislation on fortified buildings, as this is a separate issue.

<sup>18</sup> *Safer Communities and Neighbourhoods Act* (NS), *supra* note 11; *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9; *Safer Communities and Neighbourhoods Act* (AB), *supra* note 12; *Safer Communities and Neighbourhoods Act* (NB), *supra* note 10; *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1.

<sup>19</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19.

<sup>20</sup> *The Liquor, Gaming and Cannabis Control Act*, CCSM c L153.

<sup>21</sup> *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, ss 4(1)(b), 4(1)(f).

- Garbage that contains an unusually large number of bottles or containers, especially chemical containers; and
- Placing garbage in a neighbour's collection area.<sup>22</sup>

This list invites observers to make highly subjective judgments, for example, around which people *appear* to be unfriendly, yet it is advertised by provincial governments as identifying conduct that is suspicious and potentially indicative of criminal activities. Individuals are encouraged by the government to surveil and report their neighbours for any of these signs. Complainants remain anonymous and are protected from having to appear in court as a witness in any proceedings.<sup>23</sup>

The Director is provided with a SCAN unit, often staffed by former police officers,<sup>24</sup> who investigate the complaints. The evidence they collect may include notes from surveillance or in-person visits to the property, video surveillance, and the “criminal records of those attending or residing in the property”.<sup>25</sup> They may share information with police and, at times, it is a police officer who lodges the complaints that trigger SCAN investigations.<sup>26</sup>

SCAN laws empower the Director to take informal actions after receiving a complaint. These actions can include sending warning letters to the landlord or residents at a property, attempting to “resolve the complaint by agreement”, and serving a “voluntary notice to vacate” on any residents at the property.<sup>27</sup>

If the Director deems it appropriate, they may apply to court for a community safety order. The Director will justify the need for the order with evidence gathered during the investigation. Community safety orders must describe the unlawful activities; enjoin persons from “causing, contributing to, permitting, or acquiescing in

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<sup>22</sup> Saskatchewan, “Keeping Your Neighbourhood Safe”, online (website): <saskatchewan.ca/residents/justice-crime-and-the-law/your-rights-and-the-law/keeping-your-neighbourhood-safe#signs-of-illegal-activity> [perma.cc/ES7R-X4HQ].

<sup>23</sup> *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1.

<sup>24</sup> *R v Sull*, 2016 ABPC 152 at para 10 [*Sull*].

<sup>25</sup> Bruce A MacFarlane, Robert J Frater & Croft Michaelson, *Drug Offences in Canada*, 4th ed (Toronto: Carswell, 2015) at § 17:17; and detailing the SCAN surveillance apparatus in Saskatchewan, see Taylor Bereziak, *Saskatchewan's Safer Communities and Neighbourhoods Act and the Health of People Who Use Drugs* (LLM thesis, University of Ottawa, Faculty of Law, 2022) [unpublished] at 30–33; and the types of evidence used in community safety order applications, *ibid* at 56–60.

<sup>26</sup> Bereziak, *supra* note 25 at 32–33; Doherty, *supra* note 8. Examples of SCAN investigators sharing information with police include *R v Bu*, 2014 ABPC 135 (traffic stop conducted on basis of information from SCAN); *Sull*, *supra* note 24 (traffic stop conducted on basis of information from SCAN); *R v McFarlane*, 2021 ABPC 127 (warrant issued on the basis of information from SCAN).

<sup>27</sup> New Brunswick & Codiac Regional Policing Authority, “Safer Communities and Neighbourhoods investigation Unit”, online(pdf): <crpa-aprc.ca/nd-wp/wp-content/uploads/2019/09/SCAN-Presentation-2019-JEFF.pdf> [perma.cc/BT2Q-WJUW].

the activities”); and require that the persons prevent the activities from reoccurring.<sup>28</sup> Courts may grant remedies in a community safety order that have the effect of evicting tenants and even owners of the property. For example, in the Yukon, a court may terminate a tenancy, require any or all persons to vacate the property and enjoin them from re-entering it, and even close the property to any use or occupation for up to 90 days.<sup>29</sup>

When a Director applies for a community safety order, the respondent to the application is the owner of the property.<sup>30</sup> SCAN legislation may not require that tenants living in the property receive notice of the application for the community safety order and thus their only recourse is to apply, after the fact, for a variation.<sup>31</sup> Parties can also appeal a community safety order, though appeals are limited to questions of law and an appellant may require leave.<sup>32</sup>

SCAN legislation allows a branch of government to evict people from their homes based on anonymous complaints. These evictions may be court supervised, or they may occur without any court oversight of the grounds for the eviction. The case of *Wright v Yukon* involved the latter. Yukon’s SCAN legislation provides that when the SCAN unit is seeking to informally resolve a complaint, the landlord and SCAN Director may reach an agreement to terminate a residential tenancy on five days’ notice.<sup>33</sup> The relevant language of the provision reads as follows:

3(2) If the complaint is resolved by agreement or informal action that involves terminating a tenancy agreement or a lease, then despite anything in the lease or tenancy agreement or in any Act

(a) the landlord of the property may terminate the tenancy agreement or lease by giving five days notice of termination to the tenant stating

(i) the effective date of the termination,

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<sup>28</sup> *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 6(3).

<sup>29</sup> *Ibid*, s 6(2).

<sup>30</sup> *Safer Communities and Neighbourhoods Act* (AB), *supra* note 12, s 6; *The Safer Communities and Neighbourhoods Act* (MB), *supra* note 3, s 5(2); *Safer Communities and Neighbourhoods Act* (NB), *supra* note 10, ss 1(1), 8(2.1); *Safer Communities and Neighbourhoods Act* (NS), *supra* note 11, s 6(2); *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, s 7; *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 5(3).

<sup>31</sup> *Safer Communities and Neighbourhoods Act* (AB), *supra* note 12, s 11; *The Safer Communities and Neighbourhoods Act* (MB), *supra* note 3, s 12; *Safer Communities and Neighbourhoods Act* (NB), *supra* note 10, s 29; *Safer Communities and Neighbourhoods Act* (NS), *supra* note 11, s 13; *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, s 12; *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 13; and discussing this aspect of the Saskatchewan legislation, see Bereziak, *supra* note 25 at 38–44.

<sup>32</sup> *Safer Communities and Neighbourhoods Act* (AB), *supra* note 12, s 23; and interpreting the test for when leave will be granted, see *Alberta (Director of Law Enforcement) v McPike*, 2019 ABCA 330.

<sup>33</sup> *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 3(2).

- (ii) that the lease or tenancy agreement is terminated under this Part, and
  - (iii) the specified use that is the reason for the termination under this Part;
- (b) the Director may, at the request of the landlord, serve the notice of termination; and
- (c) the notice of termination may be served in any manner by which a community safety order may be served.

Only Yukon has a provision allowing a landlord to terminate a tenancy on an expedited basis, yet the other jurisdictions with SCAN legislation provide tools for evicting tenants without court oversight. In Alberta, Manitoba, New Brunswick, Saskatchewan, and Nova Scotia the SCAN Director can send a warning letter to a landlord or tenants.<sup>34</sup> Additionally, Saskatchewan empowers its SCAN Director to demand that residents vacate a property.<sup>35</sup> Tenants often feel that fighting eviction proceedings is futile<sup>36</sup>, and many likely comply with such letters and demands without taking advantage of the legal tools available to assert their rights.<sup>37</sup> The *Wright* decision was focused on a provision unique to that territory's legislation, yet it will have precedential value in other jurisdictions that have SCAN legislation because they also enable evictions without sufficient procedural safeguards and, in many instances, without any court oversight of the evidence underlying the evictions.

### III. *Wright v Yukon*

#### III.1 Factual Background

Ms. Wright, her common law spouse and her 8 children lived in a rental house in Whitehorse, the capital of the Yukon Territory. Her mother-in-law suffered from

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<sup>34</sup> *Safer Communities and Neighbourhoods Act* (AB), *supra* note 12, s 5(1)(c); *The Safer Communities and Neighbourhoods Act* (MB), *supra* note 3, s 3; *Safer Communities and Neighbourhoods Act* (NB), *supra* note 10, s 8(1)(c); *Safer Communities and Neighbourhoods Act* (NS), *supra* note 11, s 4(1)(c); *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, s 6(c).

<sup>35</sup> *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, s 6(1)(f.1). In Saskatchewan, the SCAN Director can also undertake residential tenancy proceedings on behalf of a landlord: see *ibid*, s 6(1)(f.2).

<sup>36</sup> Sarah Buhler & Rachel Tang, "Navigating Power and Claiming Justice: Tenant Experiences at Saskatchewan's Housing Law Tribunal" (2019) 36 Windsor YB Access Just 210 at 216.

<sup>37</sup> Informal evictions are notoriously difficult to track because they do not create a court record, yet there are many indications in the research on residential tenancies that most evictions are informal evictions: Sarah Buhler, "Pandemic Evictions: An Analysis of the 2020 Eviction Decisions of Saskatchewan's Office of Residential Tenancies" (2021) 35 JL & Soc Pol'y 68 at 73; Canada Mortgage and Housing Corporation, *Housing Research Report: Evictions and Eviction Prevention in Canada*, by Sarah Zell & Scott McCullough (Ottawa: May 2020) at 77, online: <eppdsrmssa01.blob.core.windows.net/cmhcprodcontainer/sf/project/archive/research\_6/evictions-and-eviction-prevention-in-canada.pdf> [perma.cc/XAW4-HCBA].

schizophrenia and bipolar disorder and had been living in a legal suite on the property, so that Ms. Wright and her spouse could care for her. On December 9, 2020, four SCAN officers attended at Ms. Wright's home and served her with an eviction notice, providing her with 5 days to move her family out of the house. She was told that a complaint had been made against her and that an investigation had established that her rental property was being used:

For the possession, production, use, consumption, sale, transfer, or exchange of, or traffic in, a controlled substance as defined in the *Controlled Drug and Substance Act* (Canada), in contravention of the Act.<sup>38</sup>

Ms. Wright was not provided with any details about the evidence that had been collected to (purportedly) substantiate this allegation. She and her spouse had both been charged with drug related offences the previous month, but they were contesting the charges and none of the allegations against them had been proven in court.<sup>39</sup> Moreover, Ms. Wright had been released on bail to her home and there was no allegation that she had breached any of her bail conditions.

The SCAN officers told Ms. Wright that she could ask for an extension of the time until eviction. She was not told about any other recourse available to her, though she had the ability to apply to court to restore the lease.<sup>40</sup> She requested an extension and was granted one until the end of January 2021. Her counsel then filed an application to judicially review the decision to terminate her tenancy and to challenge the constitutionality of SCAN legislation. Her challenge focused on how section 3(2) of the Act allows SCAN to informally resolve complaints by assisting a landlord to terminate a tenant's lease.<sup>41</sup>

On January 11, 2021, after the application for judicial review was filed, the landlord rescinded the notice of termination under SCAN and instead issued a notice of termination under the *Residential Landlord and Tenants Act*,<sup>42</sup> terminating the tenancy on March 31, 2021. Ms. Wright amended her application: she abandoned the judicial review of SCAN's decision to terminate her tenancy but proceeded with the constitutional challenge of the SCAN legislation.

The impact of the eviction on Ms. Wright and her family was significant. She was three months pregnant at the time she received the initial eviction notice and

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<sup>38</sup> *Wright v Government of Yukon*, 2024 YKSC 41 at paras 30–31 [*Wright* 2024].

<sup>39</sup> *Ibid* at para 22.

<sup>40</sup> *Ibid* at paras 32, 68; *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 13(10).

<sup>41</sup> *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 3(2); and see discussion *Wright* 2024, *supra* note 38 at para 67.

<sup>42</sup> *Residential Landlord and Tenant Act*, SY 2012, c 20; *Wright* 2024, *supra* note 38 at para 43.

miscarried later that month.<sup>43</sup> Ms. Wright left the rented property on March 31, 2021 and moved with her children into “a toy haul trailer on a friend’s property without running water and limited electricity through an extension cord.”<sup>44</sup> They spent four months there before they were rehomed in a three-bedroom apartment. Ms. Wright’s mother-in-law left her suite at the rented property and lived in a campsite for several months.<sup>45</sup>

### III.2 The preliminary matters

The initial notice of eviction was served on Celia Wright on December 9, 2020. A petition was filed on January 7, 2021, yet her matter was not heard in court until almost three years later, on November 6, 2023. In the interim, the Territorial Government brought several preliminary applications.

The Territorial Government applied to strike Ms. Wright’s claim on the basis that she lacked standing.<sup>46</sup> The parties agreed that she lost her claim to private interest standing to challenge the constitutionality of the legislation when the landlord rescinded the eviction notice provided under SCAN.<sup>47</sup> Thus, to pursue the *Charter* claim, she had to establish that she should be granted public interest standing, to bring the claim on behalf of people who might receive informal eviction notices under section 3(2) of SCAN.

The Court granted Ms. Wright public interest standing. According to the three part test set out by Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence v Canada*, an applicant for public interest standing must establish that they have raised a serious and justiciable issue, that they have a real stake or genuine interest in the matter, and that their lawsuit is a reasonable and effective way to bring the matter before a court.<sup>48</sup> The litigants agreed that the issue was serious. The second two-parts of the test were at issue. The Territorial Government characterized Ms. Wright as a mere busybody who had no genuine interest in the law. It also argued that many of the people targeted by SCAN were engaged in lucrative criminal enterprises, and thus had capacity to challenge the law.<sup>49</sup> The Court disagreed and held that Ms. Wright had a continuing interest in the eviction provision under

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<sup>43</sup> *Wright* 2024, *supra* note 38 at para 44.

<sup>44</sup> *Ibid* at para 45.

<sup>45</sup> *Ibid* at para 46.

<sup>46</sup> *Wright v Yukon (Director of Public Safety and Investigations)*, 2021 YKSC 54 [*Wright* 2021].

<sup>47</sup> *Ibid* at para 30.

<sup>48</sup> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37.

<sup>49</sup> *Wright* 2021, *supra* note 46 at paras 48, 56.

SCAN because she had been personally and directly affected by it, even though this was no longer the case at the time of the hearing of the application.<sup>50</sup> Further, it noted that people engaged in the specified activities targeted by SCAN may be marginalized or be reluctant to challenge the legislation due to fear of reprisals.<sup>51</sup> The Court accepted the argument by Ms. Wright that the legislation had not been challenged on constitutional grounds in its 15 year existence and thus one might infer that significant obstacles exist to bringing such a challenge.<sup>52</sup>

There were subsequently two hearings on the matter of costs arising from the application on standing. In the first, the Court ordered the Government to pay the costs of the application to the petitioner *forthwith*, meaning before the hearing on the merits was decided.<sup>53</sup> However, the Court declined to grant Ms. Wright special costs, holding that the issue in the litigation was not of sufficiently widespread public importance to warrant such a heightened costs awards.<sup>54</sup> The parties returned to court the following year to resolve a series of disputes about how the costs award should be calculated.<sup>55</sup>

The Canadian Civil Liberties Association (CCLA) applied to intervene in the constitutional challenge and its application was heard alongside the standing issue. The Court held that the CCLA satisfied the test for intervening.<sup>56</sup> The Court determined that CCLA's perspective would be different and helpful because of "their national base and involvement with challenging a variety of legislation under s. 7 at all levels of court, as well as their experience with arguing on behalf of affected individuals in Canadian society from a diversity of backgrounds."<sup>57</sup> The Court prohibited the CCLA from submitting any evidence and directed it to avoid duplicating any of Ms. Wright's submissions.<sup>58</sup>

The Territorial Government challenged the admissibility of two of Ms. Wright's experts, with mixed success. The Government was unsuccessful in challenging Stephen Gaetz. Gaetz, an anthropologist at York University in Toronto, Ontario, had provided expert evidence on topics including "the definition of homelessness, the causes of homelessness, who is homeless in Canada, and supporting

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<sup>50</sup> *Ibid* at para 51.

<sup>51</sup> *Ibid* at para 59.

<sup>52</sup> *Ibid* at paras 57, 59.

<sup>53</sup> *Wright v Yukon (Director of Public Safety and Investigations)*, 2022 YKSC 38 at para 13 [*Wright* 2022].

<sup>54</sup> *Ibid* at para 20.

<sup>55</sup> *Wright v Yukon (Director of Public Safety and Investigations)*, 2023 YKSC 15 [*Wright* 2023].

<sup>56</sup> *Wright v Yukon (Director of Public Safety and Investigations)*, 2021 YKSC 55 at para 8.

<sup>57</sup> *Ibid* at para 20.

<sup>58</sup> *Ibid* at paras 22–26.

people experiencing homelessness through Housing First.”<sup>59</sup> The Government argued that the evidence was too general to be relevant and not sufficiently connected to the Yukon. The Court disagreed noting that Gaetz’s evidence would help the Court understand “the nature, causes, conditions, and consequences of homelessness”, that Gaetz had relied primarily on Canadian data, and that the Government could test his evidence in cross examination.<sup>60</sup>

On the other hand, the Court agreed with the Government that Bill McCarthy’s report should not be admitted. McCarthy, a sociologist at Rutgers University in New Jersey, provided a literature review “addressing the outcomes, individually and societally, associated with evictions.”<sup>61</sup> The Court was concerned that McCarthy had not provided any assessment of the literature in his review, and his review suffered from several defects “the absence of any explanation as to how studies done in large U.S. cities, Vancouver, and Northern Europe apply to the Yukon context; the absence of explanation about the database used and the extent of Dr. McCarthy’s search; the absence of the articles themselves; and the ability to rely only on the summary provided.”<sup>62</sup>

At the hearing on the merits, in addition to Gaetz, the applicant also relied on expert evidence from Professor Caremela Murdocca on “how systemic discrimination and systemic racism may arise through [the Act].”<sup>63</sup> Additionally, four non-profit societies provided evidence on the harms caused by SCAN evictions.<sup>64</sup>

### III.3 The Decision

Ms. Wright challenged section 3(2) of the Act on the basis that it violated sections 7 and 15 of the *Charter*. Ms. Wright, in her section 7 challenge, argued *inter alia* that the provision engaged her right to security of the person and was overbroad, grossly disproportionate and contrary to the rules of procedural fairness. Meanwhile, the section 15 challenge was articulated as race-based discrimination on the grounds that the provision disproportionately impacted Indigenous people. The Court held that it did infringe section 7 of the *Charter*, and that infringement was not reasonably justified under section 1. The Court held that there was insufficient evidence to show that the section 3(2) of SCAN had an adverse impact on Indigenous peoples and thus found no infringement on section 15.

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<sup>59</sup> *Wright v Yukon (Director of Public Safety and Investigations)*, 2023 YKSC 77 at para 2.

<sup>60</sup> *Ibid* at paras 17–18.

<sup>61</sup> *Ibid* at para 3.

<sup>62</sup> *Ibid* at para 32. The Court also refused to admit a pre-print of an article co-authored by McCarthy that had been provided to the Government’s lawyers two days before the hearing.

<sup>63</sup> *Wright* 2024, *supra* note 38 at para 61.

<sup>64</sup> The Yukon Anti-Poverty Coalition, the Yukon Status of Women Council, the Safe at Home Society and the Blood Ties Four Directions Centre: see *ibid* at paras 49–57.

As a preliminary matter, the Court had to determine if there was sufficient state involvement to engage the *Charter*. The Government argued that this was essentially a private dispute, because the landlord had undertaken the eviction, initially under SCAN and subsequently under residential tenancy legislation.<sup>65</sup> The Court held that the SCAN unit had been involved in the eviction, including by investigating the tenants, sharing the results of their investigation with the landlord, and serving the notices of eviction on the tenant.<sup>66</sup> Thus the *Charter* was engaged.

To establish a section 7 violation, an applicant must show that government action has deprived them of their life, liberty or security of person and that the deprivation is contrary to the principles of fundamental justice. In applying this two-part test to SCAN legislation, the Court drew on the growing body of case law that has recognized how the displacement of unhoused people living in encampments can infringe constitutionally protected rights.<sup>67</sup>

Under the first part of the test, the Court held that the state's actions under the impugned provision impacted the security of person of the applicant, but not her life or liberty. The Court found that evictions can impact both the physical health and psychological integrity of the person being evicted.<sup>68</sup> The eviction in Ms. Wright's case had several "compounding factors", including "the short notice of five days, the cold winter conditions, the housing crisis, the lack of housing options, and the existence of the [COVID-19] pandemic".<sup>69</sup> Celia Wright said that "as a mother, not knowing if she would have a safe home for her children was the worst feeling of her life."<sup>70</sup> The Court likened this degree of psychological stress to the stress experienced by the mother in *New Brunswick v G(J)*, who was facing the loss of her children through a child apprehension proceeding.<sup>71</sup>

The Court held that the petitioner was not put at a risk of death because "a complete absence of shelter from the elements was not the inevitable result [of the eviction]" and thus the degree of interference by the state was less severe than in

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<sup>65</sup> *Ibid* at para 87.

<sup>66</sup> For a full list of SCAN's involvement, see *Wright* 2024, *ibid* at para 102.

<sup>67</sup> See e.g. *Victoria (City) v Adams*, 2009 BCCA 563; *Matsqui-Abbotsford Impact Society v Abbotsford (City)*, 2024 BCSC 1902 [*Matsqui-Abbotsford Impact Society*]. On 28 February 2025, the City of Abbotsford and the Attorney General of British Columbia were granted leave to appeal the *Matsqui-Abbotsford Impact Society* decision. See *Abbotsford (City) v Matsqui-Abbotsford Impact Society*, 2025 BCCA 78.

<sup>68</sup> *Wright* 2024, *supra* note 38 at paras 136–37.

<sup>69</sup> *Ibid* at para 135.

<sup>70</sup> *Ibid* at para 134.

<sup>71</sup> *New Brunswick (Minister of Health and Community Services) v G (J)*, 1999 CanLII 653 (SCC) [*New Brunswick v G(J)*], as discussed in *Wright* 2024, *supra* note 38 at para 135.

encampment cases where the state was preventing individuals from “creat[ing] a shelter that was the only barrier against exposure to the elements...”<sup>72</sup>

The Court held that the applicant’s liberty interests were not impacted. It determined that in encampment cases, a person’s liberty interest may be engaged because prohibitions on staying outdoors would force them into emergency shelters where they could not stay with family or would be required to comply with abstinence rules despite being in the midst of active addiction.<sup>73</sup> However, outside of this context there is no recognized right “to choose where and how to live.”<sup>74</sup> Ms. Wright had argued that her liberty interest was also at stake because her interim release conditions required her to reside at the rented premises and being evicted put her at risk of having her bail revoked. The Court rejected this argument noting that her bail had not been revoked and thus the link between eviction and bail revocation was “insufficient.”<sup>75</sup>

Under the second part of the test, the Court held that the government’s action violated three principles of fundamental justice, it departed from procedural fairness, was overbroad and was grossly disproportionate. The Court declined to consider whether the government’s action was also arbitrary.<sup>76</sup>

Procedural fairness means that a tenant evicted under the Act, should “know the case they have to meet and to have the opportunity to present their case fully and fairly.”<sup>77</sup> The Court determined that Ms. Wright’s eviction did not comply with these requirements. She had not been provided with any details about the allegations made against her or the findings from SCAN’s investigation and thus could not respond to them.<sup>78</sup> In fact, because there was no court oversight of the process, SCAN was not required to meet any evidentiary threshold before working with the landlord to evict Ms. Wright.<sup>79</sup> She could have brought an application to court to restore her lease, but this was not communicated to her. In any event, the Court held that the opportunity to have the decision revisited did not act as a full substitute for having the chance to present one’s case in advance of the decision being made *especially* since there were

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<sup>72</sup> *Wright* 2024, *supra* note 38 at para 108.

<sup>73</sup> *Ibid* at paras 115–16.

<sup>74</sup> *Ibid* at para 114, see also para 116.

<sup>75</sup> *Ibid* at para 118.

<sup>76</sup> *Ibid* at para 191–95.

<sup>77</sup> *Ibid* at para 145; the Court’s analysis of procedural fairness echoes similar developments in encampment case law, see *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at paras 46–74; *Matsqui-Abbotsford Impact Society*, *supra* note 67 at paras 107–113.

<sup>78</sup> *Wright* 2024, *supra* note 38 at para 159.

<sup>79</sup> *Ibid* at para 160.

many legislative preconditions to having the lease restored and the application had to be brought in an expedited manner.<sup>80</sup>

A law is overbroad when it “addresses conduct that has no relation to the purpose of the law.”<sup>81</sup> The Court determined that the purpose of the impugned provision was “to eliminate specified activities occurring on a property that threaten community and neighbourhood safety, security and peaceful enjoyment of property.”<sup>82</sup> The Court determined that the legislation was overbroad because it could result in the eviction of people who had not been involved in activities impacting their neighbours, for example, “roommates or relatives.”<sup>83</sup> In Ms. Wright’s case, her children and mother-in-law had been evicted despite no indication they were involved in illegal drug activity.<sup>84</sup>

A law is grossly disproportionate if its impacts on life, liberty or security of the person are “extreme” and “out of sync with the objective of the measure.”<sup>85</sup> The Court noted that the impacts of eviction on Ms. Wright’s family had been extreme, leading them to live in a situation of housing precarity for several months before being rehomed.<sup>86</sup> The Court also accepted the expert evidence from Stephen Gaetz that housing instability has negative impacts on mental and physical health.<sup>87</sup> The Court noted that there were less drastic ways to protect neighbours from the adverse impacts of illegal drug activity. SCAN had other informal resolution tools that did not involve evicting tenants or SCAN could apply for a community safety order, in which case the tenant would have a greater degree of procedural protection in the process.<sup>88</sup> The *Residential Landlords and Tenants Act* also provided landlords with tools for evicting problem tenants but again provided greater protection to the tenants.<sup>89</sup>

The Court held that the impugned provision was not a reasonable and justifiable limit under section 1 of the *Charter*, for some of the same reasons that it ran afoul of the principles of fundamental justice. The Court acknowledged that the “objective... is legitimate [but] the means of achieving it through a five-day eviction, without procedural fairness, that negatively affects those who have nothing to do with

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<sup>80</sup> *Ibid* at para 148.

<sup>81</sup> *Ibid* at para 162.

<sup>82</sup> *Ibid* at para 174.

<sup>83</sup> *Ibid* at para 176.

<sup>84</sup> *Ibid* at para 176.

<sup>85</sup> *Ibid* at para 180.

<sup>86</sup> *Ibid* at para 186.

<sup>87</sup> *Ibid* at para 186.

<sup>88</sup> *Ibid* at paras 187–88.

<sup>89</sup> *Ibid* at para 189.

the basis for the eviction, and in light of other less impairing alternatives already available in existing legislation, does not meet the section 1 test.”<sup>90</sup>

To establish a section 15 violation, an applicant must show that the impugned law “on its face or in its impact creates a distinction based on an enumerated or analogous ground; and the impugned law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage of the group.”<sup>91</sup> The Court held that the applicant had provided insufficient evidence to show an “adverse impact” under the first step of the test.<sup>92</sup> The nature of the applicant’s evidence is canvassed in greater detail below.

#### IV. Implications of the *Wright* Decision

Ms. Wright’s case has implications in four different areas. It highlights the constitutional deficiencies of SCAN legislation, which enables state actors to assist in evicting of people from their home without adequate procedural safeguards or testing of the evidence. It marks a promising evolution in section 7 jurisprudence, because the Court recognized that section 7 has applicability in housing disputes outside the context of unhoused encampments. It illustrates the difficulty of proving adverse effect discrimination under section 15, especially when the state does not collect statistics on the impact of its activities. Finally, it raises questions about ethical and other obligations of government lawyers when litigating public interest matters against lesser-resourced plaintiffs.

##### IV.1 SCAN Legislation is Constitutionally Suspect

SCAN allows the government to use residential evictions “to address criminal activity” but in a manner that “circumvent[s] the constitutional protections afforded to individuals within the criminal justice system.”<sup>93</sup> *Wright* indicates that this legislation is constitutionally suspect.<sup>94</sup> No jurisdiction other than the Yukon has a SCAN provision equivalent to the one Ms. Wright challenged, and yet her case is relevant in other jurisdictions because they all enable SCAN Directors to take steps to evict

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<sup>90</sup> *Ibid* at para 201.

<sup>91</sup> *Ibid* at para 203; *Sharma, supra* note 2 at para 28.

<sup>92</sup> *Wright* 2024, *supra* note 38 at para 215.

<sup>93</sup> Bereziak, *supra* note 25 at 7; see also Woolford & Thomas, *supra* note 6.

<sup>94</sup> In an earlier case, the Saskatchewan Provincial Court had found that a provision of the SCAN legislation in that province impermissibly violated freedom of expression, *Bitz, supra* note 5 at para 81. The provision made it an offense to wear “gang colours” in “permitted facilities”: see *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, s 60.1, as repealed by *The Safer Communities and Neighbourhoods Amendment Act, 2021*, SS 2021, c 27, s 15.

tenants without sufficient procedural safeguards or scrutiny of the evidence underlying the eviction.

All jurisdictions empower SCAN Directors to send “warning letters” and these can trigger evictions without any court oversight. Although a warning letter is supposed to put the tenant or owner on notice so they can address any alleged unlawful activity, tenants may move out in response to receiving such a letter or landlords may evict tenants in response to the letter. Landlords are financially motivated to undertake evictions once SCAN flags a property, because a landlord can be held responsible for any costs SCAN incurs closing a property.<sup>95</sup> The news media have reported on landlords moving to evict tenants after receiving a letter from SCAN,<sup>96</sup> and there are multiple written decisions involving such evictions initiated by landlords after SCAN’s involvement.<sup>97</sup> Yet, there is little data available to the public about how many warning letters result in evictions without the Director ever having to take the issue to court. The Court’s reasons in *Wright* suggest that these evictions are procedurally unfair because there is no court testing the evidence to ensure the eviction is warranted. Furthermore, the *Wright* decision acknowledges the serious harms that flow from such evictions.

Even when a Director applies for a community safety order, the absence of the tenant from the hearing creates serious issues of procedural fairness, which warrant closer legislative and judicial scrutiny.<sup>98</sup> As the Court in *Wright* noted, a tenant’s ability to revisit a decision after an order has been granted may not remedy procedural unfairness in the initial decision.<sup>99</sup> Compounding the harm, a tenant may be required to move out before the variation application is decided because, in all jurisdictions with SCAN legislation, a tenant’s application to vary a community safety order does

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<sup>95</sup> *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 26; *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, s 28; *Safer Communities and Neighbourhoods Act* (AB), *supra* note 12, s 27; *Safer Communities and Neighbourhoods Act* (NS), *supra* note 11, s 26; *Safer Communities and Neighbourhoods Act* (NB), *supra* note 10, s 42; *The Safer Communities and Neighbourhoods Act* (MB), *supra* note 3, s 25.

<sup>96</sup> “Saint John woman slams SCAN eviction”, *CBC News* (13 June 2013), online: <cbc.ca/news/canada/new-brunswick/saint-john-woman-slams-scan-eviction-1.1358444> [perma.cc/Z9B8-FMHR].

<sup>97</sup> *Delaney v Cape Breton Housing Authority*, 2015 NSSC 40 at para 4; *New Brunswick Housing Corporation Eviction Applications as a consequence of Community Safety Warnings*, 2013 NBQB 150 at para 1. Police officers have been known to encourage such evictions outside of the context of SCAN too, see *Beaverbone v Sacco*, 2009 ABQB 529 as discussed in Linda McKay-Panos, “Human Rights, Police and Tenancy: A Troubling Mix?”, *Ablawg* (23 November 2009), online: <ablawg.ca/2009/11/23/human-rights-police-and-tenancy-a-troubling-mix/> [perma.cc/SUR3-EOPY]; Doherty, *supra* note 8.

<sup>98</sup> Discussing these procedural shortcomings, see Bereziak, *supra* note 25 at 37–44.

<sup>99</sup> *Wright* 2024, *supra* note 38 at paras 148–156.

not stay the order.<sup>100</sup> Even if they are eventually vindicated, the tenant will already have suffered many of the harms involved with forcible eviction.

#### IV.2 Section 7 is Implicated in Evictions

For people looking to the courts to protect and promote the right to housing, there is much to celebrate about the *Wright* decision. In particular, the section 7 analysis in the case reflects a promising evolution in the jurisprudence underscoring how the *Charter* can be engaged to challenge forced evictions. Section 7 has played a significant role in litigation over unsheltered encampments, but has been less central to other areas of housing law.<sup>101</sup> Famously, in *Tanudjaja*, the Ontario Court of Appeal upheld a lower court decision striking a claim that governments have a duty under section 7 to provide people with housing.<sup>102</sup> In many areas of housing, the *Charter* is not obviously engaged because the housing relationship is between two private parties, such as a landlord and a tenant, or a bank and a mortgagor. But, in fact, the state is implicated throughout housing law, in its roles as legislator, regulator, funder, provider and in the context of SCAN, a partner in the eviction process. By recognizing the harms that flow from home loss outside of the encampment context, *Wright* takes the section 7 housing jurisprudence in a promising new direction.

The Court recognized multiple harms caused by forced evictions. It noted how Ms. Wright experienced extreme stress and anxiety, which was amplified by having a group of SCAN officers serve her with the notice of eviction.<sup>103</sup> The Court accepted Gaetz's evidence about the "connection between evictions, housing instability and homelessness, and poor mental and physical health outcomes."<sup>104</sup> The

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<sup>100</sup> *Safer Communities and Neighbourhoods Act* (YK), *supra* note 1, s 13(5); *The Safer Communities and Neighbourhoods Act* (SK), *supra* note 9, s 21; *Safer Communities and Neighbourhoods Act* (AB), *supra* note 12, s 20; *Safer Communities and Neighbourhoods Act* (NS), *supra* note 11, s 13(5); *Safer Communities and Neighbourhoods Act* (NB), *supra* note 10, s 29(5); *The Safer Communities and Neighbourhoods Act* (MB), *supra* note 3, s 12(5).

<sup>101</sup> See e.g. Alexandra Flynn, Heidi K Stark & Estair Van Wagner, *Encampments and Legal Obligations: Evolving Rights and Relationships* (Ottawa: Office of the Federal Housing Advocate, 2024) and the cases cited *supra* note 67; and canvassing encampment litigation in British Columbia, see Stepan Wood, "Reconsidering the Test for Interlocutory Injunctions Affecting Homeless Encampments: A Critical Assessment of BC Case Law" (2024) 61:1 Osgoode Hall LJ 161.

<sup>102</sup> *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, leave to appeal denied 2015 CanLII 36780 (SCC). Discussing the case see David DesBaillets, "The International Human Right to Housing & the Canadian Charter: A Case Comment on *Tanudjaja v. Canada (Attorney General)*" (2015) 32:1 Windsor YB Access Just 121; Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 JL & Soc Pol'y 10; Vasuda Sinha et al, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 26 JL & Soc Pol'y 43; David Wiseman, "The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?" (2015) 71 SCLR 563; Margot Young, "Temerity and Timidity: Lessons from *Tanudjaja v. Attorney General (Canada)*" (2020) 61:2 Les Cahiers de droit 469.

<sup>103</sup> *Wright* 2024, *supra* note 38 at para 135.

<sup>104</sup> *Ibid* at para 138.

Court also noted how the eviction resulted in the homelessness of Ms. Wright's dependents: her children and her mother in law, and threatened to disrupt the children's schooling.<sup>105</sup> These judicial findings cohere with a growing body of empirical evidence documenting how eviction harms the tenants, their dependents, and the communities from which they are ejected.<sup>106</sup>

The Court's holdings on the harms of eviction raise the promising possibility that the state may be constitutionally required to provide counsel when it is involved in evicting a tenant. As noted above, the Court accepted that the psychological stress experienced by Ms. Wright was akin to psychological stress experienced by the mother undergoing child apprehension proceedings in *New Brunswick v G(J)*.<sup>107</sup> In the latter case, the Court held that the mother was constitutionally entitled to receive state funded legal aid. A similar argument could be advanced in a tenancy context when there is sufficient state involvement to engage the *Charter*.<sup>108</sup>

At the same time that it recognized the harms of home loss, the Court repeatedly compared Ms. Wright's eviction with the forced displacement of unhoused people in encampments to make the point that Ms. Wright's eviction was less harmful. For example, the Court held that Ms. Wright's right to life was not engaged by the SCAN eviction, because "complete absence of shelter from the elements was not the inevitable result of a section 3(2) notice of termination of tenancy."<sup>109</sup> Following a similar line of reasoning, the Court acknowledged that an unhoused person's liberty interest was engaged when they were sheltering outdoors, but that the section 7 liberty interest was not engaged "outside of this context of a homeless person with no alternative place to live..."<sup>110</sup> Undoubtedly, the plight of unhoused people living without any permanent shelter is extreme, yet courts should guard against pointing to the magnitude of their suffering to minimize the suffering of others who are being forcibly evicted. The harms of eviction are serious and, when the government is implicated, warrant careful *Charter* scrutiny.

The Court's recognition of the harms experienced by Celia Wright and her family members is especially important given how SCAN, by its structure, effaces tenants from the legal analysis. SCAN was designed to address problem properties, as

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<sup>105</sup> *Ibid* at paras 130, 176.

<sup>106</sup> See the literature reviewed in Sarah Buhler, *The Right to Counsel for Tenants Facing Eviction: Security of Tenure in Canada* (Ottawa: Office of the Federal Housing Advocate, 2023) at 9–11 [Buhler, *The Right to Counsel*]; Berezziak, *supra* note 25 at 13–18; in *Wright*, Stephen Gaetz provided evidence specifically on the negative impact of eviction on the broader community: see *Wright* 2024, *supra* note 38 (Expert Report, Stephen Gaetz).

<sup>107</sup> *New Brunswick v G(J)*, *supra* note 71.

<sup>108</sup> Megan Parisotto, "Expanding the Constitutional Right to State-Funded Legal Counsel to Address British Columbia's Housing Crisis" (2019) 24 *Appeal* 79; Buhler, *The Right to Counsel*, *supra* note 106 at 25–27.

<sup>109</sup> *Wright* 2024, *supra* note 38 at para 108.

<sup>110</sup> *Ibid* at para 116.

though the source of any conflict is the property and not the people living there. The legislation's focus on properties is underscored by the fact that the Director is not required to give tenants notice of a court application. Instead, the legislation conceives of any court application as a matter for the government and property owner to contest. Yet, it is the residents who are removed and potentially harmed in any resulting eviction. As the Court in *Wright* recognized, the use of SCAN must account for these harms.

### IV.3 Proving a Section 15 Violation Remains Difficult After *Sharma*

Much as the *Wright* decision represents an exciting and novel step forward in the realm of section 7 jurisprudence, the Supreme Court of Yukon missed an opportunity to engage with the question of anti-Indigenous discrimination brought forward by Ms. Wright in her section 15 claim that SCAN discriminated based on race.<sup>111</sup> Indigenous people are both overrepresented in the criminal justice system<sup>112</sup> and experience acute housing precarity.<sup>113</sup> Indigenous renters have a harder time finding housing, they are more likely to rent inadequate housing, and they are more likely to be evicted.<sup>114</sup> Indigenous peoples are at a higher risk of homelessness than others living in Canada.<sup>115</sup> The lack of safe housing for Indigenous women and girls “creat[es] conditions that facilitate violence and exacerbate trauma.”<sup>116</sup> Yet, the Court held there was insufficient evidence to substantiate the claim that SCAN was disproportionately impacting Indigenous people.

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<sup>111</sup> On the desirability of recognizing anti-Indigenous discrimination as distinct from racial discrimination, see Jonnette Watson Hamilton & Jennifer Koshan, “Sharma: The Erasure of Both Group-Based Disadvantage and Individual Impact” (2024) 115 SCLR (2d) 113 at para 44 [Watson Hamilton & Koshan, “Erasure”].

<sup>112</sup> *Ewert v Canada*, 2018 SCC 30 at para 57; *Sharma*, supra note 2 at para 55.

<sup>113</sup> Drawing out how Canada's colonial legacy contributes to systemic barriers to Indigenous housing see Jesse Thistle, *Definition of Indigenous Homelessness in Canada* (Toronto: Canadian Observatory on Homelessness Press, 2017) at 13–14; Alan Hanna, *Systemic Barriers for First Nations People: Security of Tenure in Canada* (Ottawa: Office of the Federal Housing Advocate, 2023).

<sup>114</sup> Sarah Buhler & Patricia Barkaskas, “The Colonialism of Eviction” (2023) 36 JL & Soc Pol’y 23 at 27–30.

<sup>115</sup> Thistle, supra note 113 at 19–20; Yale D Belanger, Gabrielle Weasel Head & Olu Awosoga, “Housing of Urban Aboriginal People in Urban Centres: A Quantitative Perspective” (2012) 2:1 Aboriginal Pol’y Studies 4.

<sup>116</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Executive Summary of the Final Report* (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019) at 28; National Indigenous Feminist Housing Working Group, *Homeless on Homelands: Upholding Housing as a Human Right for Indigenous Women, Girls, Two-Spirit and Gender Diverse People* (National Indigenous Feminist Housing Working Group, 2022) at 17–19.

The Court's reasons point to how the existing section 15 framework, as 'clarified'<sup>117</sup> by the Supreme Court of Canada in its 2022 decision of *Sharma*, makes it difficult to prove adverse impact discrimination. To understand the evidentiary hurdles facing Ms. Wright, it bears returning to *Sharma* for a moment.

In *Sharma*, Ms. Sharma challenged the constitutional validity of provisions of the *Criminal Code*<sup>118</sup> which curtailed the availability of Conditional Sentence Orders ("CSOs"), on the basis that such laws discriminate against Indigenous people. A 5-member majority of the Supreme Court of Canada found that the provisions did not violate sections 7 or 15 of the *Charter*, and in doing so offered "clarifications" of how the section 15 test should apply.<sup>119</sup> One clarification related to the types of evidence that an applicant must produce to satisfy the first part of the section 15 test.

There is a gap between how the majority in *Sharma* described the law and what it did when it applied the law to the facts of the case. The majority allowed that *ideally* an applicant would provide evidence of both the context of the group's situation *and* the practical outcomes of the impugned laws but noted that both were not required.<sup>120</sup> It called on courts to be alive to the "asymmetry of knowledge" between claimants and the state.<sup>121</sup> It noted that statistics may not be available to prove that the provision creates a distinction, and indicated that other types of evidence may be sufficient, such as expert testimony, case studies and qualitative evidence.<sup>122</sup>

Despite making all these promising pronouncements, the majority then held that the claimant had provided insufficient evidence to establish that a distinction was being drawn. It rejected evidence of historical disadvantage of Indigenous peoples as being sufficient to satisfy the first step of the section 15 test.<sup>123</sup> It held that additional evidence was required, such as "expert evidence or statistical data showing Indigenous imprisonment disproportionately increased for the specific offences targeted by the

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<sup>117</sup> The four dissenting judges characterized the majority opinion as a revision of the test, going well-beyond mere 'clarification': see *Sharma*, *supra* note 2 at paras 204–206.

<sup>118</sup> *Criminal Code*, RSC 1985 c C-46, ss 742.1(c), 742.1(e)(ii).

<sup>119</sup> *Sharma*, *supra* note 2 at para 34.

<sup>120</sup> *Ibid* at para 49.

<sup>121</sup> *Ibid* at para 49.

<sup>122</sup> *Ibid* at para 49. On a similar notes, see *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) at para 77: "I should underline that none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not generally available, in order to show a violation of the claimant's dignity or freedom."

<sup>123</sup> *Sharma*, *supra* note 2 at para 71. Conversely, the four-member dissent was prepared to find that the impugned provision created a distinction on the basis of race, *ibid* at paras 223–225 and were explicit that they did not require statistical information to find that the provision had an adverse impact on Indigenous peoples, *ibid* at para 228.

impugned provisions, relative to non-Indigenous offenders.”<sup>124</sup> Jonnette Watson Hamilton and Jennifer Koshan have noted that this put the claimant in *Sharma* in an impossible position, because “the government was the gatekeeper of all evidence concerning incarceration by race and Indigeneity.”<sup>125</sup>

Scholars have critiqued *Sharma* for making it difficult to elicit sufficient evidence to satisfy the first part of the section 15 test by requiring applicants to show that the impugned law *creates* or *contributes* to the disadvantage.<sup>126</sup> Systemic racism often manifests itself in subtle and unconscious ways and it can be difficult to draw a direct causal link.<sup>127</sup> The difficulty faced by equality-seeking groups is exacerbated when the government agencies charged with enforcing laws fail to collect race-based data, as was the case in *Wright*.

Cognizant of the difficulties that lay in advancing race-based discrimination claim under section 15, Ms. Wright advanced four different arguments about how the impugned SCAN provision violated section 15 by disproportionately impacting Indigenous people:

1. *Numerical Approach*. On a traditional numerical approach, namely that Indigenous people were disproportionately targeted by SCAN evictions.<sup>128</sup>
2. *Consequences of Eviction*. That the consequences of SCAN evictions disproportionately impact Indigenous people, as the overwhelming majority

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<sup>124</sup> *Ibid* at para 76.

<sup>125</sup> Watson Hamilton & Koshan, “Erasure” *supra* note 111 at para 22; see also Jonnette Watson Hamilton & Jennifer Koshan, “‘Clarifications’ or ‘Wholesale Revisions’? The Last Five Years of Equality Jurisprudence at the Supreme Court of Canada” (2023) 114 SCLR (2d) 15 at para 27.

<sup>126</sup> Caitlin Salvino, “R v Sharma’s ‘Clarification’ of the Section 15 Framework and its Creation of Unique Barriers for Disability-Based Equality Claims” (2024) 32:4 Const Forum Const 1 at 4; Benjamin Perryman, “Proving Discrimination: Evidentiary Barriers and Section 15(1) of the *Charter*” (2023) 114 SCLR (2d) 93 (QL) at para 21. This is not the only criticism advanced against *R v Sharma*: see e.g. Watson Hamilton & Koshan, “Erasure” *supra* note 111; Debra Parkes & Sonia Lawrence, “R v Sharma: Reckoning with Destabilizing Truths in Constitutional Equality Adjudication” (2024) 115:4 SCLR 139; Elizabeth Shilton, “Reflections on ‘Equality, Equity, and Algorithms: Learning From Justice Rosalie Abella’” (2023) 73:2 UTLJ 179 at 186–188; Lisa Kerr, “The Place of Gladue in Constitutional Law” (2024) 33:1 Const Forum Const 1 at 5–7. Conversely, not all the academic commentary on the decision has been critical, see eg, Mark P Mancini, “Legislative Context in Sentencing: A Closer Look at R v Sharma” (2024) 33:1 Const’l Forum 19; Colton Fehr, “Reflections on the Supreme Court of Canada’s Decision in R. v. Sharma” (2023) 60:4 Alta L Rev 933. The difficulty of eliciting sufficient, or sufficiently specific statistical evidence existed prior to *Sharma*: see e.g. Jonnette Watson Hamilton & Jennifer Koshan, “Kahkewistahaw First Nation v Taypotat: An Arbitrary Approach to Discrimination” (2016) 76 SCLR (2d) 243 (QL) at paras 29–30, discussing *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

<sup>127</sup> Noting social science evidence is often limited to proving correlation and not causation, Perryman, *supra* note 126 at para 23.

<sup>128</sup> *Wright v Government of Yukon*, Supreme Court of Yukon File No 20-A0113 (Petitioner’s Supplementary Outline) at para 23.

of people experiencing homelessness or housing instability in Whitehorse are Indigenous, which puts Indigenous evictees at an increased risk of homelessness or instability;<sup>129</sup>

3. *Structure of the Law.* That the law as structured (i.e. that it is complaints-based, confidential, with no court or administrative oversight, and makes use of subjective and poorly defined decision-making criteria) perpetuates and reinforces the presence of unconscious and systemic racism in society. Put differently, people are more likely to report Indigenous people than non-Indigenous people in identical circumstances, as a reflection of unconscious biases and stereotypes.<sup>130</sup>
4. *Data Collection Argument.* The failure of the Yukon Government to collect race-based data regarding a system that operates at the intersection of criminal activity and housing instability constitutes discrimination, *in and of itself*.<sup>131</sup>

In the absence of race-based data collection by the Yukon Government on the impacts of SCAN, it was impossible for Ms. Wright to establish with certainty that Indigenous people were disproportionately targeted by evictions. Ms. Wright nonetheless presented an evidentiary record which established a web of circumstances all pointing to the distinct possibility that SCAN legislation operated in a discriminatory fashion.

- Of the six specific evictions that had been put into evidence by the SCAN Director, four targeted or resulted in the eviction of Indigenous people;<sup>132</sup>
- The Yukon Government published maps of where SCAN evictions occurred up until 2018. These maps showed evictions did not occur nearly as much in wealthy and predominantly non-racialized neighborhoods;<sup>133</sup>
- Anecdotal evidence from organizations providing services to Yukoners struggling with poverty, housing instability, homelessness or drug addiction indicated that SCAN evictions predominantly affected Indigenous people;<sup>134</sup>

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<sup>129</sup> *Ibid* at para 24.

<sup>130</sup> *Ibid* at para 25.

<sup>131</sup> *Ibid* at para 26.

<sup>132</sup> *Wright v Government of Yukon*, Supreme Court of Yukon File Number 20-A0113 (*Viva Voce* Testimony, K Bringsli).

<sup>133</sup> *Wright v Government of Yukon*, Supreme Court of Yukon File Number 20-A0113 (Affidavit, S Traverse) [Traverse Affidavit].

<sup>134</sup> *Wright v Government of Yukon*, Supreme Court of Yukon File Number 20-A0113 (Affidavit, K Mechan (on behalf of *Safe at Home*)).

- Almost all investigations conducted by the SCAN unit involved drug trafficking complaints. Indigenous people are significantly overrepresented in all aspects of the criminal justice system, including regarding drug trafficking offences.<sup>135</sup>

In support of her argument that the failure to collect race-based data on the effects of SCAN itself amounted to discrimination, Ms. Wright relied on the fact that this particular type of legislation operates at the intersection of housing instability and criminal justice, and that in both of these contexts Indigenous people are well-known by all levels of government to be overrepresented. This, combined with the web of circumstances raised by Ms. Wright, was enough to create an obligation for the Yukon Government to monitor the effects of its laws on Indigenous people. The failure to collect race-based data, Ms. Wright argued, effectively and practically prevented Indigenous people from vindicating their section 15 rights in court. This denial of access to justice constitutes discrimination, as it perpetuates a historical disadvantage of Indigenous peoples, namely the difficulty they face in shedding light on their circumstances in court.

The trial judge's reasons collapsed all of Ms. Wright's arguments into a purely numerical analysis. The trial judge acknowledged the ability of a petitioner to rely on qualitative evidence to establish discrimination but nonetheless reduced the question to whether such evidence established that section 3(2) of SCAN led to disproportionate evictions of Indigenous people.<sup>136</sup> The Court rejected the evidence elicited from the SCAN investigator about the number of Indigenous residents they had unhoused as being "anecdotal," and from the expert as not being "Yukon specific".<sup>137</sup> This manner of reasoning reflects the majority's approach in *Sharma* and illustrates how difficult it can be for applicants to establish a *causal* link. The trial judge's decision on section 15 did not engage with Ms. Wright's novel argument, that failure to collect data amounted to discrimination. This argument has been left for a future litigant to make, and a future court to consider in detail, as a way of addressing the asymmetry of knowledge between claimants bringing equality claims and the state.

#### VI.4 Zealous Advocacy in the Context of a Power Imbalance

When claimants sue the state, there is often an additional asymmetry: in the litigants' respective resources. A plaintiff's lack of resources can impede them from producing a comprehensive evidentiary record,<sup>138</sup> it also limits their ability to pursue litigation at

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<sup>135</sup> Traverse Affidavit, *supra* note 133.

<sup>136</sup> *Wright* 2024, *supra* note 38 at para 215.

<sup>137</sup> *Ibid* at para 215.

<sup>138</sup> Perryman, *supra* note 127 at para 23; Raji Mangat, "Interveners, Public Interest Litigation and Social Context: Advancing Equality Rights on Uneven Terrain" (2023) 114 SCLR (2d) 135 (QL) at para 100.

all, or to respond to the procedural maneuvers of government counsel. Advocates involved in public interest litigation have noted that better-resourced government defendants commonly behave in ways that appear designed to exhaust the plaintiff's means or otherwise avoid a decision on the merits of their claim.<sup>139</sup>

The Territorial Government erected several barriers to Ms. Wright's challenge of the constitutionality of the SCAN legislation. First, the SCAN notice of eviction was rescinded, the SCAN Director ended its involvement in the matter, and the landlord used a different statute to terminate Ms. Wright's tenancy. The Government then challenged Ms. Wright's standing, characterizing her as a mere busybody. The Government opposed an application to intervene by the CCLA. Before the hearing of the merits, the Government challenged the admissibility of Ms. Wright's expert evidence. Responding to these matters makes significant time and resource demands on *pro bono* counsel and can delay the progression of the underlying challenge.<sup>140</sup>

Lawyers must be zealous advocates for their clients, but there is a countervailing duty to avoid needlessly delaying litigation.<sup>141</sup> There is a live debate, both in the academic scholarship and Canadian caselaw about whether government lawyers have special ethical duties, but there is a consensus that they have additional public obligations.<sup>142</sup> Cases like *Wright* raise the question of what those public obligations require in the context of public interest litigation, where the government regularly (though not uniformly) comes to matters as the better resourced litigant. This important topic warrants further consideration.

## V. Conclusion

The *Wright* case is remarkable for how it advanced the legal analysis of the constitutionality of SCAN legislation and section 7 in housing cases. In those provinces that have adopted, or that plan to adopt SCAN legislation, legislators should take note of its constitutional frailties and make amendments to address them. For example, a good start would be to ensure that tenants receive notice of and a chance to

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<sup>139</sup> Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) 355 at 366; Lund, *supra* note \* at 231.

<sup>140</sup> Government counsel knew Ms. Wright's lawyer was acting *pro bono* as that had been put into evidence in one of the costs applications, see *Wright 2022*, *supra* note 53 at para 24.

<sup>141</sup> For example, the Federation of Law Societies of Canada's *Model Code of Professional Conduct* (April 2024) provides the following in its commentary on Rule 5.1: "In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute."

<sup>142</sup> Andrew Flavell Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal LJ 443 at 447–451.

participate in a court hearing before a community safety order is granted against the premises where they reside.

In terms of the difficulty of proving section 15 discrimination and the procedural hurdles raised by government counsel, the *Wright* case is *yet another* example of the barriers to advancing adverse effect claims and public interest litigation. At the same time, it leaves open the possibility of a future litigant arguing that section 15 is violated by the state's failure to collect data on the impacts of its laws and conduct, especially in areas such as housing and criminal justice, where the state has reason to suspect that marginalized groups may be adversely impacted.

Perhaps the most remarkable thing about the *Wright* case is that Ms. Wright persevered through years of litigation and many hurdles to secure an important housing law precedent that highlights the constitutional frailty of SCAN legislation and pushes the boundaries of section 7 jurisprudence in a meaningful way.